LE COPY

Office-Supreme Court, U.S.
FILED
JAN 12 1965
JOHN F. DAVIS, CLERK

No. 760

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE FLORIDA NATIONAL BANK OF JACKSONVILLE, FLORIDA, and Herbert T. Ballard, Jr., as Co-Executors of the Estate of Herbert T. Ballard, Deceased, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LOUIS F. OBERDORFER,
Assistant Attorney General,

DAVID O. WALTER,
LORING W. POST,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and Regulations involved	2
Statement	2
Argument	3
Conclusion	8
Appendix	9

CITATIONS

Cases:

Commissioner v. *Estate of Canfield*, 306 F. 2d 1	7
Commissioner v. *Estate of Church*, 335 U.S. 632	4
Commissioner v. *Estate of Holmes*, 326 U.S. 480	5, 6
Commissioner v. *Ridgway's Estate*, 291 F. 2d 257	8
Hassett v. *Welch*, 303 U.S. 303	4
Helvering v. *Bullard*, 303 U.S. 297	4
Industrial Trust Co. v. *Commissioner*, 165 F. 2d 142	6
Lober v. *United States*, 346 U.S. 335	5, 6, 7
May v. *Heiner*, 281 U.S. 238	4
Mellon v. *Driscoll*, 117 F. 2d 477, certiorari denied, 313 U.S. 579	5
Porter v. *Commissioner*, 288 U.S. 436	5, 6
Sanford, Estate of v. *Commissioner*, 308 U.S. 39	5

Statutes: Page

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):
Sec. 2031 ..... 2, 9
Sec. 2036 ..... 2, 3, 4, 6, 7, 9
Sec. 2038 ..... 2, 5, 6, 7, 10
Joint Resolution of March 3, 1931, 46 Stat. 1516 4
Revenue Act of 1924, 43 Stat. 253, Sec. 302(d) 5
Technical Changes Act of 1953, 67 Stat. 615, Sec. 207 ..... 4, 7

Miscellaneous:

Lowndes and Kramer, *Federal Estate and Gift Taxes* (1962 ed.), p. 188 7
S. Rep. No. 685, 83d Cong., 1st Sess., pp. 7-8 4
Treasury Regulations on Estate Tax (1954 Code), Sec. 20.2031-1 ..... 2, 6, 7, 10

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 760

THE FLORIDA NATIONAL BANK OF JACKSONVILLE, FLORIDA, and Herbert T. Ballard, Jr., as Co-Executors of the Estate of Herbert T. Ballard, Deceased, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 14a-21a)[1] is reported at 221 F. Supp. 861. The opinion of the court of appeals (Pet. 9-15) is reported at 336 F. 2d 598.

---

[1] Record references are to the appendix to the Government's brief in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1964. (Pet. 2.) The petition for a writ of certiorari was filed on December 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the limitation provision in Section 2036 of the Internal Revenue Code of 1954 (relating to transfers with retained life estate) making that section inapplicable to transfers made before March 4, 1931, precludes the levying of an estate tax under Section 2038 of the Code (relating to revocable transfers).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Sections 2031, 2036 and 2038 of the Internal Revenue Code of 1954, and Section 20.2031-1 of the Treasury Regulations on Estate Tax (1954 Code), are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

The decedent (Herbert T. Ballard) died on December 15, 1956. (R. 14a; Pet. 11.)

In 1929, the decedent had created an *inter vivos* trust for the benefit of his wife and children. However, he reserved the right to make any change in the limitations with respect to the distribution of

principal and income, provided that no such appointment should be in favor of himself or his estate. He also reserved the right to remove the trustee named in the indenture and to appoint another trustee. (R. 3a-4a, 7a, 14a; Pet. 11-12.)

The taxpayers (executors of the decedent's estate) filed a federal estate tax return but did not include the value of the trust assets in the gross estate. The Commissioner of Internal Revenue held that the trust should be included and asserted a deficiency in the estate tax accordingly. The taxpayers paid the tax and filed a claim for refund which was not allowed; and thereafter the taxpayers instituted this action in the district court. (R. 11a-12a; Pet. 12.)

The district court held that the taxability of the transfer was governed by Section 2036 of the Internal Revenue Code of 1954 which does not apply to a transfer made before March 4, 1931; and that the applicability of Section 2036 precludes taxation under Section 2038 even if the latter section would otherwise apply. (R. 17a.) The court of appeals held that the two sections are not mutually exclusive and that the instant transfer is taxable under Section 2038. (Pet. 15.)

ARGUMENT

The decision of the appellate court is clearly correct and there are no grounds warranting further review by this Court.

1. Section 2036 of the 1954 Internal Revenue Code requires the inclusion in a decedent's gross estate of

property donatively transferred by him, by trust or otherwise, where he retained for his life the income from the property or the right to designate the persons who shall possess or enjoy the property or the income therefrom. Since the present decedent retained the power to change the shares of beneficial interest in principal and income of the trust fund, it is clear that the trust assets would be includible in his estate under Section 2036 were that section applicable. By its express terms, however, Section 2036 does not apply to a transfer made before March 4, 1931.[2] Since the trust in this case was created in

---

[2] In *May* v. *Heiner*, 281 U.S. 238, and some other cases following it, this Court held that the retention of the income for life by the settlor of a trust was not alone enough to justify the inclusion of the corpus in the settlor's gross estate. In order to overcome the effect of such decisions, Congress passed the Joint Resolution of March 3, 1931, 46 Stat. 1516, providing for taxation where the transferor retained for his life the income from the property or the right to designate the persons who shall possess or enjoy the property or the income therefrom. This Resolution was held to be applicable prospectively only to transfers made after the date of its enactment. *Hassett* v. *Welch*, 303 U.S. 303; *Helvering* v. *Bullard*, 303 U.S. 297. Some years thereafter, in *Commissioner* v. *Estate of Church*, 335 U.S. 632, this Court held that the retention of a life estate was sufficient to require inclusion of trust corpus in the settlor's gross estate under the estate tax laws prior to the Joint Resolution, thus expressly overruling *May* v. *Heiner*. However, the *Church* decision was subsequently modified by Congress so as to restore the pre-existing rule with respect to transfers made prior to March 4, 1931. See Section 207 of the Technical Changes Act of 1953, 67 Stat. 615; S. Rep. No. 685, 83d Cong., 1st Sess., pp. 7-8. This modification was carried forward into Section 2036 of the 1954 Code.

1929, the assets of the trust are admittedly not includible in the decedent's gross estate under Section 2036.

Section 2038 of the 1954 Code provides for the inclusion in the gross estate of property donatively transferred by a decedent where the enjoyment was subject at the date of his death to any change through the exercise of a power by the decedent alone or in conjunction with any other person, to alter, amend, or revoke.[3] It has long been settled that this provision covers a case where the decedent reserved the power to change the enjoyment of the property or the income in a substantial way even though he could not exercise the power in favor of himself or his estate. *Porter* v. *Commissioner*, 288 U.S. 436; *Commissioner* v. *Estate of Holmes*, 326 U.S. 480; *Lober* v. *United States*, 346 U.S. 335; *Mellon* v. *Driscoll*, 117 F. 2d 477 (C.A. 3d), certiorari denied, 313 U.S. 579; cf. *Estate of Sanford* v. *Commissioner*, 308 U.S. 39. In the instant case, the decedent's reserved power to change the enjoyment of the trust property was plainly sufficient to justify taxation under Section 2038 of the Code, and the court of appeals correctly so held. (Pet. 15.) Indeed, we do not understand that the taxpayers would contend otherwise except for the fact that there is an overlapping provision in Section 2036.

---

[3] This provision was introduced into the law as Section 302 (d) of the Revenue Act of 1924, 43 Stat. 253; and it has been continued in subsequent statutes with some changes and modifications which are of no importance here.

2. Taxpayers take the position (Pet. 4-6) that, in view of the overlap, Congress could not have intended to exempt a trust from taxation under Section 2036 and yet tax it under Section 2038 in the absence of reservation by the settlor of some rights in addition to those distinctly described in and excluded from taxation by virtue of Section 2036. Taxpayers are mistaken.

Section 2036 is essentially concerned with the power to govern enjoyment of income from transferred property; while 2038 is basically concerned with the power to determine the enjoyment of the property itself. Treasury Regulations on Estate Tax (1954 Code), Section 20.2031-1; *Industrial Trust Co.* v. *Commissioner*, 165 F. 2d 142 (C.A. 1st); *Lober* v. *United States*, 346 U.S. 335. In the instant case, the power of the decedent extended to both principal and income of the trust; Section 2038 is plainly applicable; and the mere fact that Section 2036 would also be applicable, absent the exclusionary provision contained therein, does not mean that the exclusionary provision should be read into Section 2038 when it plainly is not there. Indeed, if the taxpayers' position were correct and these statutory provisions were mutually exclusive, then cases such as *Porter* v. *Commissioner*, 288 U.S. 436; *Commissioner* v. *Estate of Holmes*, 326 U.S. 480; and *Lober* v. *United States*, 346 U.S. 335, should all have been decided under the predecessors to Section 2036 instead of being decided under the predecessors to Section 2038 as they were. And it will be noted that the transfers in both *Porter* and *Lober* were made prior to 1931 so that under the

taxpayers' view they would be exempt from taxation accordingly. There is no basis for that view in the law or the legislative history; and the absurdity of taxpayers' suggestion (Pet. 5) that cases of this type involving pre-1931 transfers were overruled by Section 207 of the Technical Changes Act of 1953, 67 Stat. 615 (see note 2, *supra*), is demonstrated by the fact that *Lober* was decided by this Court in November, 1953 —several months after the passage of that Act.

Rather than being mutually exclusive, Sections 2036 and 2038 are but examples of the many instances of overlapping provisions in the estate tax laws. Thus, Section 20.2031-1 of the Treasury Regulations on Estate Tax (1954 Code) states that there is considerable overlap in the application of sections 2036 through 2038 with respect to reserved powers, so that transferred property may be includible in the decedent's gross estate in varying degrees under more than one of those sections. As pointed out by the court of appeals (Pet. 15), the text writers are in accord with this view. See particularly Lowndes and Kramer, *Federal Estate and Gift Taxes* (1962 ed.), p. 188.

3. Taxpayers' assertion (Pet. 6) of a conflict with *Commissioner* v. *Estate of Canfield*, 306 F. 2d 1 (C.A. 2d), is without merit. In that case the decedent had given up her power long before she died. Section 2038 could accordingly not be applied, and the court merely held that in the circumstances the transfer should be treated as made prior to March 4, 1931, so that it was not taxable under Section 2036 even though she retained the right to the income until she died. In the instant case the decedent did not give

up his power and he retained it until his death. As noted by the court of appeals (Pet. 12-13) the *Canfield* case is similar to a prior decision of the Third Circuit (*Commissioner* v. *Ridgway's Estate*, 291 F. 2d 257) and neither of those cases has any bearing on the instant case.

CONCLUSION

The decision below is clearly correct, and it is not in conflict with any other decision. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

DAVID O. WALTER,
LORING W. POST,
Attorneys.

JANUARY, 1965.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 2031. DEFINITION OF GROSS ESTATE.

(a) *General.*—The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * *

SEC. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.

(a) *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

(b) *Limitation on Application of General Rule.*—This section shall not apply to a trans-

fer made before March 4, 1931; nor to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

SEC. 2038. REVOCABLE TRANSFERS.

(a) *In General.*—The value of the gross estate shall include the value of all property—

* * * *

(2) *Transfers on or before June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph.

* * * *

Treasury Regulations on Estate Tax (1954 Code):

Sec. 20.2031-1 *Definition of Gross Estate; Valuation of Property.*—(a) *Definition of gross*

estate.—Except as otherwise provided in this paragraph the value of the gross estate of a decedent who was a citizen or resident of the United States at the time of his death is the total value of the interests described in sections 2033 through 2044. * * * The contents of sections 2033 through 2044 are, in general, as follows:

* * * *

(2) Sections 2035 through 2038 deal with interests in property transferred by the decedent during his life under such circumstances as to bring the interests within the decedent's gross estate. Section 2035 includes in the decedent's gross estate property transferred in contemplation of death, even though the decedent had no interest in, or control over, the property at the time of his death. Section 2036 provides for the inclusion of transferred property with respect to which the decedent retained the income or the power to designate who shall enjoy the income. Section 2037 includes in the decedent's gross estate certain transfers under which the beneficial enjoyment of the property could be obtained only by surviving the decedent. Section 2038 provides for the inclusion of transferred property if the decedent had at the time of his death the power to change the beneficial enjoyment of the property. It should be noted that there is considerable overlap in the application of sections 2036 through 2038 with respect to reserved powers, so that transferred property may be includible in the decedent's gross estate in varying degrees under more than one of those sections.

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 760142 517